90-242

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1990

JAMES RAY DABNEY, RONALD EUGENE BLACK, KENTON THOMAS HALL, JEFFREY DEAN GREGG, ROBERT LEWIS GILCHRIST, BOBBY O'NEAL HOLDER, DONALD S. JAMISON AND EDWARD HIGGINS,

Petitioners.

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTIONS PRESENTED

1. Did the South Carolina Supreme Court err in holding that the five year period of time for the use of prior offenses which was in effect when the petitioners pled guilty to the prior offenses was not part of the punishment at that time and therefore could be changed without violating the ex post facto provision of Article I, § 10 of the United States Constitution.

PARTIES TO THE PROCEEDING

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THE STATE OF SOUTH CAROLINA

Petitioners, James Ray Dabney, et al. respectfully pray that a writ of certiorari issue to review the judgement of the Supreme Court of the State of South Carolina entered on April 16, 1990.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is reported at 391 S.E.2d 563 (S.C. 1990) and is reprinted at Appendix A,

at page 1. The order denying a rehearing is reprinted at Appendix B, at page 6.

JURISDICTION

The judgement of the Supreme Court of the State of South Carolina was entered on April 16, 1990, and a timely petition for rehearing was denied on May 7, 1990. The jurisdiction of this Court arises under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The driving under the influence statute for the State of South Carolina is found in South Carolina Code of Laws § 56-5-2990 (1989 Cum. Supp.). The specific provision is as follows:

> Only those violations which occurred within ten years including and immediately preceding the date of the last violation shall constitute prior violations within the meaning of this section.

The prior driving under the influence statute for the State of South Carolina provided as follows:

> Only those violations which occurred within a period of five years including and immediately preceding the date of the last violation shall constitute prior violations within the meaning of this section.

STATEMENT OF THE CASE

The petitioners all had a prior conviction for driving under the influence which was more than five years old at the time of their arrest on the present charges. At the time of either their plea or trial on the former offenses, the law of the State of South Carolina provided that if a driving under the influence conviction occurred within the next five years then that offense would be a second or subsequent offense.[1] If an offense occurred more than five years after that offense, then the petitioner would be guilty of only a first offense since the prior offense, by law, could not be used to enhance the punishment for any offense which occurred more than five years after the date of arrest of the prior offense.

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[1] The South Carolina legislature changed the driving under the influence statute effective July 23, 1981 to reduce the applicable time period from ten years to five years. Some of the petitioners have offenses which predate the July 23, 1981 change. The petitioners who have such convictions would have been entitled to the application of the new five year limitation under the theory that a criminal defendant is entitled to the benefit of any favorable change in the law as it may affect any of his convictions.

The South Carolina legislature changed the law effective January 1, 1989 so that if an offense occurred within ten years, then it could be used to enhance the punishment of the petitioners. When the petitioners pled guilty or were found guilty of the offenses which occurred after January 1, 1989, the court applied the new ten year provision instead of the five year provision which had been applicable at the time of the petitioners' prior offense. As a result of the retroactive application of the statute, the petitioners were all convicted of a second or subsequent offense at the time of their plea or guilty verdict.[2]

The Supreme Court of the State of South Carolina affirmed the convictions of the petitioners by upholding the retroactive application of the law which took effect on January 1, 1989. THe court held that the prcvision of the old law

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[2] Under South Carolina law, first offense driving under the influence cases are tried in the magistrate's court, whose jurisdiction is limited to fines of two hundred dollars and thirty days imprisonment. Second and subsequent offenses are tried in the Court of General Sessions.

that provided that only offenses that occurred within five years could be used to enhance the punishment was not a part of the punishment for the prior offense and therefore could be changed.

With the exception of the petitioner Higgins, in each case the question of the applicability of the ex post facto provision of Article I, § 10 of the United States Constitution was raised by the petitioners at the trial below and ruled upon by the South Carolina Supreme Court. As to the petitioners Hall, Gregg, Gilchrist, Holder, and Malone the issue was raised on pages 10-11 of the transcript of record in their case when the petitioners raised the issue of the application of the ex post facto provision to their case and specifically cited to the trial court the decision of this Court in Weaver v. Graham 450 U.S. 24 (1981). That portion of the transcript is reprinted at Appendix C at page 8.

The petitioner Black raised the issue on page 37 of the transcript of record in his case when his attorney asserted the new law violated

the ex post facto provision of Article 1, § 10 of the United States Constitution. That portion of the transcript is reprinted at Appendix D at page 12. The petitioner Jamison raised the issue at page 5 of the transcript of record of his case when the trial judge preserved the issue on the record for Jamison. That portion of the transcript of record is reprinted at Appendix E at 15. The petitioner Dabney raised the issue on page 2 of the transcript of record in his case when his attorney asserted the new law violated the ex post facto provision of Article 1, § 10 of the United States Constitution. That portion of the transcript of record is reprinted at Appendix F at page 17. The attorney for the petitioner Higgins raised the issue sua sponte on his appeal to the South Carolina Supreme Court and their ruled upon the issue.

REASONS FOR GRANTING THE WRIT

A. The retroactive application of the ten year provision of the new law which took effect on January 1, 1989 is a violation of the ex post facto provision of Article I, § 10 of the Con-

stitution of the United States.

The ex post facto provision of Article I, § 10 to the Constitution of the United States prohibits not only the enactment of laws which make criminal such conduct which was legal when committed, but also prohibits the government from changing the punishment given for a crime that had been completed before the new law took effect. See, Calder v. Bull, 3 U.S. 386 (1798) The position of the petitioners is that the law which took affect on January 1, 1989 changed the punishment for acts which were completed prior to January 1, 1989.

At the time of the prior convictions a part of the sentence was the fact that a defendant was told by law that if he were arrested again for driving under the influence within a period of five years, he would be charged with a second or subsequent offense. If he were not arrested within five years, then the prior offense could not be used to enhance any subsequent conviction. The South Carolina Supreme Court held that these provisions were not a part

of the punishment and therefore could be changed without violating the ex post facto provision of Article 1, § 10. If the five year provision is part of the punishment, as the petitioners contend, then the ex post facto provision of Article I, § 10 would prohibit the retroactive application of the law which took effect on January 1, 1989.

No one would question that knowing that a person would be subjected to enhanced punishment for ten years is a greater punishment than being subjected to enhanced punishment for a period of five years. The legislature could not have increased the fine for the prior offense by even one penny without violating the ex post facto provision of Article I, § 10 to the Constitution of the United States . In fact, if given the option, the petitioners would prefer to pay a higher fine for the prior offense than to receive the five year limitation rather than the ten year limitation. To the petitioners the punishment of increasing the time period is a greater punishment than the fine.

The ex post facto provision of Article I, § 10 can be equated to a promise by the state that it would not change the conditions of the crime at the time the defendant was convicted. The State of South Carolina, having promised each of the petitioners that their conviction would not be used after five years to enhance their punishment, can not now go back on that promise and change the number of years a conviction can be used to enhance the punishment.[3]

While no specific case such as the facts presented in this case can be found, several cases lend support for the proposition urged by the petitioners. This Court has long recognized that a change in the punishment as well as making conduct criminal which was previously legal violates the ex post facto provision of Article 1, § 10. Calder v. Bull, 3 U.S. 386 (1798) In Weaver v. Graham 450 U.S. 24 (1981) this Court

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[3] If the five year provision of the old law is not deemed to be part of the punishment, then an interesting question is raised as to whether the petitioners would be entitled to habeas corpus relief because their attorneys erroneously told them that the conviction could not be used to enhance their punishment after five years.

stated the basic principles for reviewing an ex post facto claim. In that case this Court held that "[t]wo critical elements must be presented for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." Id. at 24. The petitioners contend that the new law as applied in this case does both. First, the law applies to events before its enactment. If the law only applied to convictions resulting from arrests that occurred after January 1, 1989, then this case simply would not have arisen as the old five year law would have been applied. The new law also disadvantages the petitioners as it changes the effect of the convictions which were completed prior to the enactment of the new law.

The fact that the petitioners may have had "knowledge" a subsequent conviction would lead to enhanced punishment is not dispositive of the issue. First, the petitioners had the right to rely upon the promise of the state that the

prior convictions would be used for only five years to enhance any punishment for a second or subsequent offense. The petitioners could not have expected that the state would go back on that promise. Secondly, the Fourth Circuit rejected such a position in Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989). In Fender a Virginia inmate sought to declare as invalid a determination by the Virginia parole board that he was subjected to life imprisonment without parole. In 1973 Fender was convicted of various offenses and sentenced to life imprisonment. At that time he had a parole eligibility of fifteen years. In 1985 the Virginia legislature passed a law that provided that a person who escaped while serving a life sentence would not be eligible for parole upon his recapture. In 1987 Fender escaped. Upon his capture he was determined to be ineligible for parole during the remainder of his life sentence. In holding that the new law violated the ex post facto provision of the Constitution of the United States notwithstanding the fact that Fender was on "notice" of

the new law, the Fourth Circuit said "[t]he crucial issue here . . . is not that petitioner had notice . . . but that the . . . provision, which was passed after the commission of the [first offense], alters his punishment for that offense to his disadvantage." Id. at 307. Surely the certainty of the knowledge that a conviction could not be used to enhance punishment after five years is more worthy of protection under the ex post facto provision of Article I, § 10 than the mere possibility of earning parole.

This case does not involve a typical recidivist statute which seeks to enhance punishment for a prior offense for which the state has not made a promise. In this respect, this case is markedly different from recidivists statutes which have been held constitutional against arguments that the act violates the ex post facto provision of Article I, § 10 to the constitution. In the present case, the state assured the petitioners that their prior offenses would only have a detrimental effect for enhancement purposes for only five years. The state cannot now go back on

that promise.

CONCLUSION

South Carolina Code of Law § 56-5-2940 (1989 Cum. Supp.) on its face applies to events which were completed prior to the January 1, 1989 effective date of the law. As the law applies to events which were completed prior to the effective date of the law, it has retrospective application. As the law alters the consequences of the prior promise of the state at the time of their prior conviction, it violates the ex post facto provision of Article I, § 10 of the United States Constitution.

NO.

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APPENDIX
PETITION FOR A WRIT OF CERTIORARI
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APPENDIX A
THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

James Ray Dabney,

Appellant.

AND

The State,

Respondent,

v.

Ronald Eugene Black,

Appellant.

AND

The State,

Respondent,

v.

Donald S. Jamison,

Appellant.

AND

The State,

Respondent.

v.

Kenton Thomas Hall, Jeffrey Dean Gregg,
Robert Lewis Gilchrist, Bobby O'Neal

Holder, and Dean Mitchell Malone[4],

Appellants.

AND

The State,

Respondent,

v.

Edward Higgins,

Appellant.

Appeals From York, Greenwood & Union Counties
James E. Moore, and Robert L. McFadden, Judges

Opinion No. 23195
Heard March 5, 1990 - Filed April 16, 1990

AFFIRMED

Thomas A. McKinney, of Rock Hill, for appellant James Ray Dabney; William E. Whitney, Jr., of Union, for appellant Ronald Eugene Black; C. Rauch Wise, Marvin R. Watson, and Billy J. Garrett, Jr., of Greenwood, for appellants Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder and Dean Mitchell Malone; Melvin A. Roberts, of York, for appellant Donald S. Jamison; Assistant Appellant Defense, of Columbia, for appellant Edward Higgins.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Norman Mark Rapoport, all of Columbia; and Solicitors Larry F. Grant, of York and W. Townes

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[4] Dean Mitchell Malone died while the appeal was pending before the South Carolina Supreme Court.

Jones, of Greenwood, for respondent.

PER CURIAM: Appellants pled guilty to or were convicted of driving under the influence (DUI). All had previous DUI convictions that they assert were erroneously used in calculating the level of the present offenses. We affirm.

South Carolina Code Ann. § 56-5-2940 (Supp. 1989) establishes the penalty for first offense DUI and for subsequent offenses, and provides the method for determining what previous offenses shall be included in calculating consideration of previous offenses was ten (10) years. On May 21, 1981, the time period was reduced to five (5) years. Effective January 1, 1989, the time period was again increased to ten (10) years.

Appellants committed the present offenses after January 1, 1989. They were sentenced under the amended statute and received enhanced punishment less than ten (10) years before the commission of the present offense. Appellants assert the application of § 56-5-2940 to their cases is

unconstitutional as a violation of the ex post facto clause. We disagree.

A law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the ex post facto clauses of the United States and South Carolina Constitutions. U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). However, it is not a violation of the ex post facto clause for the legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947); McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1900); cf. Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) and Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (violation of ex post facto clause to affect parole eligibility existing at time of convic-

tion).

In these cases, the amendment of § 56-5-2940 simply lengthened the period of time previous convictions can be used to increase the punishment for a subsequent offense. Appellants committed the offenses they were sentenced for after the effective date of the statute's amendment and it was their conduct in committing these offenses that triggered the recidivist feature of § 56-5-2940. We hold the statute does not violate the ex post facto clause. See Hinson v. Coulter, 723 P.2d 655 (Ariz. 1986).

Accordingly, appellants' convictions and sentences are affirmed.

AFFIRMED.

s/ George T. Gregory, Jr. C. J.

s/ David W. Harwell A. J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A. J.

s/ Jean H. Toal A. J.

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

May 7, 1990

C. Rauch Wise, Esquire
Wise and Tunstall
Attorneys at Law
408 Main Street
Greenwood, S. C. 29646

RE: The State v. James Ray Dabney, Ronald Eugene Black, Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder, Dean Mitchell Malone and Donald S. Jamison

Dear Mr. Wise:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition Denied.

s/ George T. Gregory, Jr. C. J.

s/ David W. Harwell A. J.

s/ A. Lee Chandler A. J.

s/ Ernest A. Finney, Jr. A. J.

s/ Jean H. Toal A. J.

May 7, 1990.

The remittitur in this matter is today being forwarded to the Clerk of Court for York, Greenwood, and Union Counties.

Sincerely,

CLERK

CND,Jr./dmh
cc: Thomas A. McKinney, Esquire
William E. Whitney, Jr., Esquire
Melvin L. Roberts, Esquire
The Honorable Harold M. Coombs, Jr.

APPENDIX C

Mr. Wise: Your Honor, I think for the record I need to ask the court to direct a verdict of not guilty on behalf of all the clients on the grounds they don't meet the five year statute on the grounds that the previous offense should not be included as an offense for this time, due to the fact that they were under the old law which held the eligibility to five years. I would cite to the court the case of Weaver versus Graham, which is found in 67 Lawyers Edition, 2nd, 17, A U. S. Supreme court case, in which the court states in that case that "The critical Question is whether the law changes the legal consequences of acts completed before its effective date." And quite clearly, the new law changes the legal consequences of their prior DUI which was completed before the effective date of the new law, which was January of this year. And we should basically look at this way, which I think is a simple way of looking at it, that when all these gentlemen were before the court previously years ago that the court in essence

said to them, or the State of South Carolina cut a bargain with them is another way of putting it, that said in essence if you're found guilty, or plead guilty to DUI, your license is in jeopardy for five years for a second offense. Now, in Mr. Hall's case, and some of them some seven, eight, nine years later, the State has in essence come up and said not true, we lied to you back there in 1982, or 1980, or whenever the offense was, that we're going to hold your license in jeopardy for ten years. We were just kidding with you back then. The court in the Weaver case made a very significant note when it said in that case that "we have previously recognized that a prisoner's eligibility for reduced imprisonment', because Weaver dealt with reduction in parole, "is a significant factor entering into both the defendant's decision to plead guilty and the judge's calculation of sentence." Here, likewise, the fact that a person when they plead guilty to a DUI charge, or commits a crime of DUI back in 1982, knows what the ramifications of that act is. And that act is that your license

will be in jeopardy for five years. So, I think in keeping with the spirit of the Weaver case, here we have a situation where the decision to commit the crime, maybe, or the decision to even plead guilty, was made with knowledge that your license is in jeopardy for five years and, therefore, you'll be free after that. I think that the obvious purpose of that Ex Post Facto is to prevent your being punished for an act that's been completed. Here not only has the act been completed, but the state has in essence ended your probation time on your license. But, now, they come in and say we really didn't mean what we said a few years ago, we were just kidding with you back then, sorry about the inconvenience of having to be up here today. But, I think that is what the Ex Post Facto is designed to prohibit, is from the state kind of reneging on its promise, or its contract with the person who comes before the court and pleads guilty, or is found guilty. So, on that basis, I think these cases should not be up here as second offenses, or third offenses, but should be in the lower

court for first offense. Therefore, this court does not have jurisdiction of the matter.

APPENDIX D

Your Honor, it is our position that that law is unconstitutional and first of all that it is ex post facto because it deprives Mr. Black of exception of a former conviction that he had, that it now has resurfaced. There is a case of Wilensky versus Fields, a Florida case, 267 So.2d; furthermore, Your Honor, we would take the position that it also violates Article 1, Section 10 of the United States Constitution which says that no State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law or law impairing the obligation of contracts, or grant any title of nobility.

Your Honor, further we would take the position that the first conviction should be struck because it did not -- the State did not produce evidence to comply with the Unites States Supreme Court case of Boykin versus Alabama and

Gideon versus Wainwright as to the questions I asked Officer McCarloy is he knew the answers to. He did not know the answers and did not produce any evidence to that effect. Mr. Black testified that he forfeited bond and that he was not advised of any rights by anyone or any consequences of how that was going to affect him in the future.

Your Honor, as you will recall, several years ago they had a 10 year Statute for DUI and they changed it back to 5 years. At that time a lot of defendants got the benefit of that reduction and reduced their sentences, their cases were dismissed. It seems to me basically inherently unfair to turn around later and just do the opposite where you punish these defendants and yet you rewarded those defendants. We think it is unconstitutional. If they did it for one set and let some people go and then they turn around and try to pick up, I guess, the same people they let go before. We think it is just basically unfair and unconstitutional.

THE COURT: You're correct in that it was

the law that all offenses for the past 10 years were included as prior offenses. I do not know the exact date but I think around 1978 the Legislature changed that 10 year Statute to a 5 year Statute. Then the Highway Safety Act was passed in 1988, signed by the Governor on May 18th, 1988, to be effective January 1, 1989 and that 5 year Statute or the Statute that included all offenses for the past 5 years was changed to 10 years and that Statute reads: "Only those offenses which occurred within a period of 10 years including and immediately preceding the date of the last offense shall constitute prior offenses within the meaning of this section."

The Court concludes that this Statute was applicable when this defendant, Mr. Black, was arrested on January 26, 1989, and because it was in effect at the time of the offense the Court would conclude that the 1981 conviction and the 1987 conviction are prior offenses within the contemplation of this Statute and that this would be a third offense of driving under the influence.

MR. ROBERTS: And I question the jurisdiction of this court because it must be a second or subsequent offense in order for this court to have jurisdiction. It's my position his offense is only a first offense and this court would not have jurisdiction of a first offense.

THE COURT: Well, I think we have concurrent jurisdiction of first offenses when they are brought in conjunction with matters properly before the court. And I'm going to overrule your motion on that.

On the other matter, I note that your motions to preserve your rights are renewed. And I realize that there is a concern under recent opinion by the United States Supreme Court. The Honorable Justice O'Connor has given a very clear indication of the matters there where they must meet two conditions. And that if there be a retrospective affect and application, then prejudicial and contrary to the constitutional rights of the defendant. And I note your position that the motions are renewed. And I'm going

to deny your motions. And I understand you're planning to seek an appeal bond in order to formally pursue that matter; is that correct?

THE COURT: I believe you had a motion you wanted heard before anything else happened, right?

MR. McKINNEY: Yes, I do, Your Honor. That is correct.

THE COURT: You may proceed.

MR. McKINNEY: If it please the court. Your Honor, on behalf of the defendant, Mr. Dabney, I would move at this time for dismissal of the charges against him as they now stand. He is charged with driving under the influence fourth offense. I would ask that the court dismiss those charges allowing the State to re-indict and recharge Mr. Dabney for DUI second offense on the grounds that the legislation recently enacted and which came into effect on January the first, 1989, violates the Constitution of the United States, which in Article One, Section Ten of the Constitution provides that neither the United States nor any state shall pass any ex post facto law.

I cite from the leading case and the most

recent case on this issue, the case of Miller versus Florida, 96 L Ed. 2d 351, which states the test as follows: Prohibiting ex post facto laws in which there must be two critical elements; first, the law -- and I quote directly from that case -- must be retrospective. That is, it must apply to events occurring before its enactment. And number two, it must disadvantage the offender affected by it. In this case, Mr. Dabney.

That case goes further to say that with regard to element number one, a law is retrospective if it changes the legal consequences of acts completed before its effective date. The facts in this case I believe would be stipulated that in 1981 the defendant, Mr. Dabney, was charged and convicted with two driving under the influence charges. Additionally, in 1985, he was charged and convicted with a driving under the influence charge. After January of 1989, he was charged on this particular violation. And the State, following the ten year new statute enacted by the legislature, went back to his 1981 convictions and in fact charged him with fourth

offense. Obviously, if this had occurred in December of 1988, it would only have been his second offense. Therein lies the reason for our motion.

Again, the law is retrospective if it changes the legal consequence of acts completed before its effective date. The acts we're referring to here were the two acts that occurred in 1981. The new law changed the legal consequences of those acts because in 1981 this defendant, along with others, had notice that those two acts, in 1981, for purposes of subsequent convictions, would be used for a period of five years. That five years was up on 1986. Those legal consequences of those acts have been changed as a result of the 1989 legislation.

That fits directly in point with the definition of the first element of what makes a law ex post facto, in that the legal consequences of those two acts have changes now, rather than five years going back ten years, and it has affected or disadvantaged Mr. Dabney. Certainly, the sentence imposed for second offense, under

the law, would be much less than the sentence imposed or that could be imposed under fourth offense.

Your Honor, I realize that the court has heard an argument similar to this one. My argument does not go to the act committed after January of 1989 by this defendant. My argument goes directly to the quote of legal consequences of the acts completed before the effective date of the law. Obviously, those two 1981 acts were completed before the effective date of the law. And this has changed the consequences of those acts. And that is the first element.

In the alternative to that motion, Your Honor, I would ask this court, should the court deny my motion, I would ask this court to continue this case, to leave it on the docket, until such time as I have had the opportunity to appeal this matter to the South Carolina Supreme Court and any further appeal that may be necessary in order to answer this question.

This question, as I understand it in talking to lawyers over the State who handle

cases like this, is one of great importance at the present time. Obviously, because it involves legislation that was recently passed under a law that is now on the records and involves a lot of defendants. I myself have had several since the new law has taken effect. So I would ask the court to continue this matter until such time as the appeals process is exhausted or until such time as the appeal may be withdrawn.

As a third alternative or a second alternative, I would ask the court, should the court deny my first two motions and require us to proceed with the trial of this case, should the defendant be convicted, I would ask the court to stay any imposition of sentence until such time as we have exhausted the appeals with regard to this ex post facto motion.

(2)

No. 90-242

Supreme Court, U.S.
FILED
SEP 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES RAY DABNEY, RONALD EUGENE BLACK, KENTON THOMAS HALL, JEFFREY DEAN GREGG, ROBERT LEWIS GILCHRIST, BOBBY O'NEAL HOLDER, DONALD S. JAMISON AND EDWARD HIGGINS, Petitioners,

v.

THE STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When an offense of driving under the influence is committed after the effective date of a new driving under the influence recidivist statute, may the punishment be enhanced by prior offenses committed when the recidivist statute had a five-year reachback period, and the new recidivist statute has an increased ten-year reachback period?

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No. 90-242

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

JAMES RAY DABNEY, RONALD EUGENE BLACK, KENTON THOMAS HALL, JEFFREY DEAN GREGG, ROBERT LEWIS GILCHRIST, BOBBY O'NEAL HOLDER, DONALD S. JAMISON AND EDWARD HIGGINS, Petitioners,

v.

THE STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent State of South Carolina respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of South Carolina's opinion in this case. That opinion is State v. Dabney, et al., ____S.C.____, 391 S.E.2d 563 (1990) and is reproduced in Respondent's Appendix. Respondent notes that Petitioners

incorporated typographical errors in the Opinion found in Petitioners' Appendix A that may affect the clarity of the Opinion.

STATEMENT OF THE CASE

S.C. Code Ann. § 56-5-2940 (Supp. 1989) punishes recidivist driving under the influence offenders on the basis of the number of their prior offenses. The statute codifies Act No. 532 of 1988 which provides that effective January 1, 1989 "prior offenses" are "those offenses which occurred within a period of ten years including and immediately preceding the date of the last offense...." Previously, Act No. 76 of 1981, effective May 21, 1981, had restricted "prior offenses" to only five years. Neither act made any provision for the disposition or punishment of future, uncommitted offenses.

For driving under the influence offenses committed on, or after, January 1, 1989, Petitioners were punished according to the number of prior offenses within a period of ten years. The new law was applied solely to punish offenses of driving under

the influence that occurred after its enactment and effective date of January 1, 1989. No penalty for any earlier offense was increased. Only an offense subsequent to the effective date of the new law was subject to increased punishment, and there was no violation of the ex post facto prohibition.

SUMMARY OF ARGUMENT

The new driving under the influence law became effective January 1, 1989, lengthening the period -- from five to ten years -- within which prior offenses of driving under the influence were statutorily available to count against an offender for purposes of enhancing punishment for a new offense. Petitioners were sentenced for offenses of driving under the influence committed after the effective date of the amended statute. The amended recidivist statute lengthened the period of time previous convictions can count to increase the punishment for a subsequent offense. The statute punishes only new crimes and is not ex post facto since it only allows convictions before its amendment to be used to determine the penalty for a new offense.

REASON WHY THE PETITION SHOULD BE DENIED

The ex post facto clause allows enhanced punishment for a new, repeated offense when the prior offense(s) took place before the enhancement provision was in effect.

S.C. Code Ann. § 56-5-2940 (Supp. 1989) sets greater penalties for recidivist driving under the influence offenders on the basis of the number of their prior offenses. Act No. 532 of 1988 provides that effective January 1, 1989 "prior offenses" are "those offenses which occurred within a period of ten years including and immediately preceding the date of the last offense...." Previously, Act No. 76 of 1981, effective May 21, 1981, had restricted "prior offenses" to only five years.

In light of the constitutional prohibition of ex post facto laws, Petitioners contend that an offense committed when prior offenses were calculated within a five-year time span is only viable as a prior offense for a five-

year period and cannot presently be used as a prior offense -- even though pursuant to § 56-5-2940 and Act No. 532 of 1988, the offense "occurred within a period of ten years including and immediately preceding the date of the last offense...."

Respondent strongly disagrees with Petitioners' assertion of error. The ex post facto prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. ...[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed. 2d 17 (1981). It is not a violation of the ex post facto

prohibition for a defendant to be deprived of even a "substantial protection" such as that afforded by the reformation of an improper verdict. The ex post facto clause of Article I, § 10 proscribes laws that (1) punish as a crime an act previously done that was innocent when done; (2) make punishment more burdensome after the commission of a crime; and (3) deprive an accused of a defense available at the time when the act was committed. Collins v. Youngblood, Op. No. 89-742 (U.S. filed June 21, 1990).

South Carolina Constitution Article I, § 4 also forbids ex post facto legislation. The new law became effective January 1, 1989, lengthening the period -- from five to ten years -- within which prior offenses of driving under the influence were statutorily available to count against an offender for purposes of enhancing punishment for a new offense. Those offenders affected by the

lengthened period of the new legislation would appear to have been disadvantaged. However, the new law did not apply retrospectively. The new law was applied solely to events that occurred after its enactment and effective date of January 1, 1989.

Petitioners repeatedly claim that at the time of prior convictions, they were the beneficiaries of a promise that the prior convictions would be used for only five years to enhance punishment for any subsequent offense. This purported promise is without any statutory authority or any other basis in the record. The statutes identify a period of years to determine the number of prior offenses for the sole purpose of punishing the current offense. No statute made any promise concerning the disposition or punishment of any future -- uncommitted -- offense.

Petitioners' reliance upon Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) is misplaced. Fender v. Thompson supports Respondent's position and was cited by the Supreme Court of South Carolina in State v. Dabney, et al., 391 S.E.2d at 564. In Fender v. Thompson, the Virginia legislature enacted a statute eliminating parole eligibility for prison escapees who had been sentenced to life imprisonment.[1] In the present case, Petitioners are complaining about sentence enhancement for a new offense committed after the effective date of the new recidivist statute. Nothing in the new recidivist statute affected the punishment

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[1]A prisoner on parole continues to serve his sentence outside of the prison walls and remains in legal custody. Sanders v. MacDougall, 244 S.C. 160, 163, 135 S.E.2d 836 (1964). "[C]onditions of parole eligibility are part of the punishment of a crime." Schwartz v. Muncy, 834 F.2d 396 and n.7 (4th Cir. 1987), citing Warden v. Marrero, 417 U.S. 653, 661-664 (1974).

of other offenses committed before the effective date of the new statute.

Petitioners cannot demonstrate an offense of driving under the influence committed prior to January 1, 1989, that is now the subject of punishment under the new statute. No penalty for any earlier offense was increased. Only an offense subsequent to the effective date of the new law was subject to increased punishment, and there was no violation of the ex post facto prohibition.

> A law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the ex post facto clauses of the United States and South Carolina Constitutions. U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). However, it is not a violation

> of the ex post facto clause for the legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947); McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1900); cf. Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989) and Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (violation of ex post facto clause to affect parole eligibility existing at time of conviction).

State v. Dabney, et al., ____S.C.____, 391 S.E.2d 563 (1990).

S.C. Code Ann. § 56-5-2940 (Supp. 1989) enhances punishment for recidivist driving under the influence offenders. Its punishment is only for new crimes after its effective date of January 1, 1989. An amended enhancement statute that punishes

only new crime is not ex post facto since it only allows convictions before its amendment to be used in assessing the penalty for a new offense -- subsequent to the effective date of the amended statute -- and does not increase punishment for prior convictions. Petitioners were sentenced for offenses of driving under the influence committed after the effective date of the amended statute. Petitioners' conduct in committing their offenses resulted in the application of the current statute for their punishment. "[T]he amendment of § 56-5-2940 simply lengthened the period of time previous convictions can be used to increase the punishment for a subsequent offense. ...[T]he statute does not violate the ex post facto clause." Id.

The Petition should be denied. The record does not support Petitioners' contention that any driving under the influence recidivist statute made them a

promise concerning the disposition or punishment of any future -- uncommitted -- offense. The new law was applied solely to punish driving under the influence offenses that occurred after the statute's effective date of June 1, 1989. The Supreme Court of South Carolina correctly determined that the ex post facto clause allows enhanced punishment for a repeated offense -- based upon prior offense(s) -- although the prior offense(s) took place when the enhancement provision was not in effect. The case was correctly decided and is consistent with public policy and the Court's prior decisions.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

James Ray Dabney, Appellant.

AND

The State, Respondent,

v.

Ronald Eugene Black, Appellant.

AND

The State, Respondent,

v.

Donald S. Jamison, Appellant.

AND

The State, Respondent,

v.

Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder, and Dean Mitchell Malone, Appellants.

AND

The State, Respondent,

v.

Edward Higgins, Appellant.

Appeals From
York, Greenwood & Union Counties
James E. Moore, and
Robert L. McFadden, Judges

STATE v. DABNEY, et al.

Opinion No. 23195
Heard March 5, 1990 - Filed April 16, 1990

AFFIRMED

Thomas A. McKinney, of Rock Hill, for appellant James Ray Dabney; William E. Whitney, Jr., of Union, for appellant Ronald Eugene Black; C. Rauch Wise, Marvin R. Watson, and Billy J. Garrett, Jr., of Greenwood, for appellants Kenton Thomas Hall, Jeffrey Dean Gregg, Robert Lewis Gilchrist, Bobby O'Neal Holder and Dean Mitchell Malone; Melvin A. Robert, of York, for appellant Donald S. Jamison; Assistant Appellate Defender Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for appellant Edward Higgins.

Attorney General T. Travis Medlock, Assistant Attorneys General Harold M. Coombs, Jr., and Norman Mark Rapoport, all of Columbia; and Solicitors Larry F. Grant, of York and W. Townes Jones, IV, of Greenwood, for respondent.

PER CURIAM: Appellants pled guilty to or were convicted of driving under the influence (DUI). All had previous DUI convictions that they assert were erroneously used in calculating the level of the present offenses. We affirm.

South Carolina Code Ann. § 56-5-2940 (Supp. 1989) establishes the penalty for first offense DUI and for subsequent offenses, and provides the method for

determining what previous offenses shall be included in calculating the appropriate penalty. Prior to May 21, 1981, the time period for consideration of previous offenses was ten (10) years. On May 21, 1981, the time period was reduced to five (5) years. Effective January 1, 1989, the time period was again increased to ten (10) years.

Appellants committed the present offenses after January 1, 1989. They were sentenced under the amended statute and received enhanced punishment based on their prior DUIs which were committed more than five (5) years but less than ten (10) years before the commission of the present offense. Appellants assert the application of § 56-5-2940 to their cases is unconstitutional as a violation of the ex post facto clause. We disagree.

A law which imposes additional punishment to that prescribed at the time the offense was committed is prohibited under the ex post facto clauses of the United States and South Carolina Constitutions. U.S. Const. art. I, § 10, cl. 1; S.C. Const. art. I, § 4; Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981); State v. Matthews, 296 S.C. 379, 373 S.E.2d 587 (1988). However, it is not a violation of the ex post facto clause for the legislature to enhance punishment for an offense based on a prior conviction of the defendant, even though the enhancement provision was not in effect at the time of the previous offense. Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed. 1683 (1947); McDonald v. Massachusetts, 180 U.S. 311, 21 S.Ct. 389, 45 L.Ed. 542 (1900); cf. Fender v. Thompson, 883 F.2d 303 (4th

Cir. 1989) and Schwartz v. Muncy, 834 F.2d 396 (4th Cir. 1987) (violation of ex post facto clause to affect parole eligibility existing at time of conviction).

In these cases, the amendment of § 56-5-2940 simply lengthened the period of time previous convictions can be used to increase the punishment for a subsequent offense. Appellants committed the offenses they were sentenced for after the effective date of the statute's amendment and it was their conduct in committing these offenses that triggered the recidivist feature of § 56-5-2940. We hold the statute does not violate the ex post facto clause. See Hinson v. Coulter, 723 P.2d 655 (Ariz. 1986).

Accordingly, appellants' convictions and sentences are affirmed.

AFFIRMED.

/s C.J.

/s A.J.

/s A.J.

/s A.J.

/s A.J.